

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRIAN P. KEMP, ET AL.,	:	
	:	
DEFENDANTS.	:	

**TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS**

**BEFORE THE HONORABLE AMY TOTENBERG**

**UNITED STATES DISTRICT JUDGE**

**MAY 9, 2018**

**4:04 P.M.**

***MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED***

***TRANSCRIPT PRODUCED BY:***

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**P R O C E E D I N G S**

**(Atlanta, Fulton County, Georgia; May 9, 2018.)**

COURTROOM DEPUTY CLERK: Good afternoon, Counsel. This is Amy McConochie, Judge Totenberg's courtroom deputy clerk. The Court is joining the conference call in Civil Action 17-CV-2989. That is the case of *Curling vs. Kemp*, just to keep it a little shorter.

Counsel, I'm going to remind you that we have a lot of people, I assume, on this call. So it is very important that you state your name when you first start speaking so that both Judge Totenberg and the court reporter, Ms. Welch, will know who is speaking at any given time.

And I'm going to ask you-all to please introduce yourselves starting with plaintiffs' counsel. Then you will all be on the line with Judge Totenberg.

MR. MCGUIRE: Hi, this is Robert McGuire for the Coalition plaintiffs. And with me is also Bruce Brown and Cary Ichter. And we have our client, Marilyn Marks, on the phone.

MR. CROSS: This is David Cross with Morrison & Foerster for the Curling plaintiffs. My colleague, Catherine Chapple, I believe, is on the phone. And I'm hoping our co-counsel, Mr. Knapp, may be on as well.

MR. KNAPP: We are.

MS. CHAPPLE: Good afternoon, Your Honor.

THE COURT: Good afternoon.

1 MR. BARNES: Your Honor, this is Roy Barnes and John  
2 Salter for Kemp and the State Elections Board.

3 MS. JOHNSON: Laura Johnson for Dekalb County.

4 MR. WHITE: Daniel White here for Cobb County.

5 MS. BURWELL: Kaye Burwell, David Lowman, and Cheryl  
6 Ringer for Fulton County.

7 MR. SCHNELL: Grant Schnell with Holland & Knight for  
8 Merle King.

9 THE COURT: All right. This is Judge Totenberg.  
10 Good afternoon.

11 MR. CROSS: Good afternoon, Judge.

12 THE COURT: Did you make any progress about the  
13 machines and releasing any of the machines or not?

14 MR. McGUIRE: Your Honor, this is Robert McGuire for  
15 the Coalition plaintiffs. We -- after the -- after the hearing  
16 last week, we met for about 20 minutes in the courtroom and  
17 then we have been exchanging a lot of correspondence since  
18 then. We had a call on May 4.

19 The position we're in is that we have asked the  
20 counties to provide us with information that we need in order  
21 to determine what machines we can, quote-unquote, release. And  
22 we are still in the situation where we need information from  
23 the counties in order to tell them what machines are of  
24 interest for us.

25 And so we haven't been able to propose a plan of

1 selection for the machines that we want to do discovery on for  
2 them to preserve. Unfortunately, we're still -- we're at a bit  
3 of an impasse because the defendants have kind of taken the  
4 position that discovery is not open so they don't have to give  
5 us any information that we need in order to tell them what  
6 machines we don't need to look at.

7 That is from our side. And I know the other  
8 plaintiffs have been doing some separate planning as well. We  
9 have also taken care of the other thing in your minute order.  
10 We filed our notice of material allegations. And the state  
11 defendants filed their advisory notice of immunity defenses.

12 Our hope was that we could address each of those  
13 issues, as well as the third amended complaint, which we were  
14 hopeful the Court would be willing to accept and let us move  
15 forward on.

16 MS. CHAPPLE: Your Honor, this is Catherine Chapple  
17 for the Curling plaintiffs. As counsel for the Coalition  
18 plaintiffs noted, we had been also working diligently to come  
19 up with a sample of machines that will allow us to let the --  
20 let the defendants know which machines we don't need so they  
21 can be released from the sequestered pool of machines.

22 And we had a very -- what we saw as a very productive  
23 call on Thursday in which the defendants noted that because  
24 they already really have the machines that they will be using  
25 for the May primaries the question of which machines should be

1 released is maybe not as urgent as it seemed at first because  
2 the next time that they will need machines is not until August.

3 And so we're continuing to work with them and provide  
4 the information -- you know, provide the information that we  
5 need from them. And we're working towards that.

6 MS. RINGER: Your Honor, this is Cheryl Ringer from  
7 Fulton County. I would take exception to some of what you  
8 heard.

9 As you requested when we were in court, I did forward  
10 the same information that I had provided to prior plaintiffs'  
11 counsel, which identified by precinct and serial number the  
12 machines that were used in the April and in the June 2017  
13 elections. I provided that information.

14 Plaintiffs' counsel has requested that we provide it  
15 via (unintelligible) of some sort. But I believe it is  
16 something that they need to do and not defendants. So I  
17 provided exactly what we provided to previous counsel.

18 There is a disagreement as to what additional  
19 information would be needed. From our perspective, we provided  
20 what we provided prior plaintiffs' counsel and they said they  
21 could use that to make a sample. We now understand that  
22 between the two plaintiffs they are not in agreement as to what  
23 sort of sampling they would need. That presents an issue for  
24 us.

25 As well, there is an ongoing dispute about any sort

1 of requirement that we would have had to sequester machines  
2 from November and December 2017. We have spoken to our clients  
3 and have been able at the last minute to pull two machines.  
4 But at this juncture we need them to release an additional two  
5 machines that have been sequestered. We don't have extra  
6 machines.

7 And, in fact, what we identified to plaintiffs were  
8 that at this point in preparing for May 22nd we're already so  
9 far down the line that testing has begun and things have been  
10 set in motion that if we continue to argue about what machines  
11 we get it won't be in time for May. So we did agree to let's  
12 start working on the machines after any sort of runoff for  
13 May 22nd.

14 But our understanding as to where we are is a little  
15 bit different from what you just heard.

16 MR. ICHTER: Your Honor, this is Cary Ichter. May I  
17 address that --

18 THE COURT: Yes.

19 MR. ICHTER: -- for the Coalition plaintiffs?  
20 Ms. Ringer may very well have supplied us with spreadsheets  
21 that indicate what the inventory of machines were for the April  
22 and June 2017 elections.

23 For some reason, it appears as though the defendants  
24 have come to the joint conclusion that the only machines and  
25 only memory cards to which the litigation hold and the Court's



1 order of evidence preservation apply are those from the  
2 Congressional Sixth District election and that all other  
3 machines are available for wiping and for overwriting and for  
4 deploying for upcoming elections.

5 We were distressed to learn last week that perhaps  
6 hundreds of machines that were the subject of litigation holds  
7 and the Court's evidence preservation order that were used in  
8 the November 8, 2016, election; the November 7, 2017, election;  
9 the December 5, 2017, election were overwritten or wiped. That  
10 is that the data from those machines was deleted and  
11 essentially destroyed and those machines were then deployed to  
12 the field for use in the pending election.

13 We don't know where the notion comes from that that  
14 is okay. There is nothing in any of the litigation hold  
15 letters, there is nothing in the evidence preservation order  
16 from the Court indicating that you can wipe clean data from  
17 machines that are the subject of this lawsuit.

18 We identified the relevant elections in the  
19 complaint -- in the second amended complaint and in the third  
20 amended complaint. And those were among the elections that  
21 were identified, and those machines have been wiped. That is  
22 spoliation of evidence.

23 I want to make sure the Court understands this  
24 though. The defendants are likely to argue and I think are  
25 going to argue that scores of machines are going to be made

1 available to us for testing. And that is going to be a select  
2 group that are handpicked by the defendant. Generally  
3 speaking, I have a problem with my opposition picking my  
4 samples in connection with any kind of analysis of evidence  
5 that needs to be performed in a case.

6           What we are looking for is machines that have been  
7 involved in unusual or anomalous results, machines in precincts  
8 that show meaningful discrepancies between ballot counts and  
9 number of voters, machines that have generated voter complaints  
10 because of malfunctions, machines that show repetitive error  
11 messages and individual audit logs, machines that generate  
12 unanticipated maintenance issues, machines that show that no  
13 votes were cast on them whatsoever -- that would be  
14 particularly interesting given the protest we hear about the  
15 desperate need for machines to be deployed to the field -- and  
16 machines that were involved in the Fulton County April 18,  
17 2017, upload errors.

18           We are looking for those kinds of machines because  
19 those would be indicative of the possibility of some sort of  
20 tampering. We believe that the best way to resolve any issues  
21 concerning preservation are that the -- for the counties to be  
22 ordered by the Court -- and this has nothing to do with the  
23 discovery. This has to do with preservation of evidence so  
24 that when we can get to the discovery phase -- when we get to  
25 the discovery phase we can conduct meaningful discovery about

1 what has actually happened.

2 We're asking that the Court order that no further  
3 machines be deployed to the field to precincts until such time  
4 as there is a mirror image of the drives on the DREs. These  
5 are just computers. If we were dealing with any other kind of  
6 issue, if we were dealing with some sort of question of  
7 financial issues and the county was saying, oh, well, we have  
8 to use our accounting software every day, it is modified every  
9 day, you can't prevent us from using it, everybody would say  
10 the same thing: Make a mirror image of it so that everybody  
11 can access it and we all know what we're dealing with.

12 So what we should -- all these machines we learned  
13 last week have to be prepped. They have to be rolled out to  
14 the field. They have to -- they are wiping them, and that is a  
15 part apparently of the prep process.

16 So what they should do is as they prep them to deploy  
17 them to the field make a mirror image of the hard drives on the  
18 machines and of the memory cards so that the Curling plaintiffs  
19 can do whatever they want to do with that data and the  
20 Coalition plaintiffs can do whatever they want to do with that  
21 data and there is no increased burden on anybody to make that  
22 data available to two sets of plaintiffs because we're just  
23 picking from the same data that has been preserved.

24 But in any other kind of case, that is exactly what  
25 would happen and that is all we're asking that happens here.

1 And they can roll out the machines as they are mirror imaged.  
2 And then we don't care what happens to them from there. We  
3 don't care about the machines. We care about the data.

4 THE COURT: Well, since they have been wiped -- since  
5 they have been -- the ones that are currently there have not  
6 been wiped. So you are worried -- you are still worried about  
7 those and you are just saying to mirror the -- do a mirror  
8 image of the machine and the cards for those and they can have  
9 the machines; is that right?

10 MR. ICHTER: That is correct, Your Honor.

11 MR. WHITE: Your Honor, this is Daniel White on  
12 behalf of Cobb County. I think this is a good point for me  
13 just to go back and point out that what has happened in this  
14 case is that there was a litigation hold first sent in July of  
15 2017 that asked all of the counties to hold their machines and  
16 cards from the April and June elections of 2017.

17 And it was then not until later in the fall that the  
18 plaintiffs attempted to then go back and say let's go back and  
19 hold all of your machines from 2016, which if you ask the  
20 counties will tell you is 90 percent of their machines and  
21 cards that were rolled out in the presidential election -- hold  
22 those while we decide how to collect the data. And then again  
23 earlier this year there was another letter sent that said,  
24 please hold all your machines from November of 2017.

25 So in essence, we have been asked to hold -- well, in

1 their case, apparently it is as easy as just making a mirror  
2 image. It is not that easy. They don't have any testimony to  
3 present to you that it is that easy. We can get our election  
4 people here and tell you that it is not that easy and it is  
5 expensive.

6 What we said from the beginning is if you want to  
7 enjoin us from using our machines, if you want our clients to  
8 not use these machines, you need to make a motion for  
9 preliminary injunction. You need to pay the bond for the cost  
10 of us doing this because that is what you are doing is you are  
11 litigating through litigation hold. You are trying to get an  
12 injunction through a litigation hold and it is not --

13 THE COURT: I'm sorry. When did you say that?

14 **(Unintelligible cross-talk.)**

15 THE COURT: I'm sorry. When did you say that? I  
16 have never heard you say that before. When did you say --

17 MR. WHITE: That has been in discussions -- this is  
18 in discussions with plaintiffs.

19 THE COURT: But when? Most recently? You mean in  
20 the last week?

21 MR. WHITE: Last fall.

22 What is that, Your Honor?

23 THE COURT: Before I issued the order of December 15?

24 MS. RINGER: These discussions were had when the  
25 preservation order was received and discussed. And it is

1 that -- I'm sorry. This is Cheryl Ringer from Fulton County.

2 Those emails -- and one of which Ms. McConochie was  
3 on -- where defendants specifically objected to any language in  
4 the preservation order that would have kept us from using our  
5 machines. This is not the first time this has come up.

6 MR. WHITE: Your Honor, your order stated that the  
7 Court recognizes the case involves Government and public  
8 officials with the responsibility to execute and prepare for  
9 future elections. And that is the countervailing interest here  
10 that we told them about from the beginning.

11 MR. ICHTER: Your Honor, this is Cary Ichter.

12 **(Unintelligible cross-talk.)**

13 THE COURT: All right. Let me -- you-all have made  
14 obviously not a lot of progress. So let me just say this. I  
15 mean, the election is in the end of -- the end of May. And I'm  
16 just -- I don't know how many -- what is kind of stunning to me  
17 is I don't know how many more machines you need.

18 And there is a pragmatic solution here for now. I  
19 can't see you next week and I can't -- and probably the  
20 following week I'm going to be having a trial. So you are  
21 welcome to come to see me at some terrible time of the day for  
22 all of you.

23 But I don't -- I don't really understand why -- what  
24 the problem is in actually fashioning a pragmatic interim  
25 solution. And is it true or is it not true that you-all

1 need -- in fact, don't need these machines for the next  
2 election? I mean, that was the first thing that was -- one of  
3 the things that was represented to me.

4 Do you actually -- do any of the counties actually  
5 need more machines -- and if so, how many -- for the May  
6 election?

7 MS. JOHNSON: Your Honor, this is Laura Johnson for  
8 Dekalb County. Our elections people need 450 more machines to  
9 use. They have sequestered all of the machines from April and  
10 June 2017. At the moment they are sequestering 300 from the  
11 November and December '17 elections. But they cannot continue  
12 to sequester all of those. They need at least 450 of those  
13 released.

14 THE COURT: So --

15 MR. WHITE: Your Honor, part of the problem -- this  
16 is Daniel White from Cobb County -- is the defendants were all  
17 holding machines from June and April of 2017. And at this  
18 point, if you combine all the machines that the litigation hold  
19 purportedly applies to, it is over 90 something percent of our  
20 machines going back to November of 2016.

21 So yes. If we're going to talk about all the  
22 machines that have been used since November 2016, we need those  
23 machines released.

24 MS. CHAPPLE: Your Honor, this is Catherine Chapple  
25 for the Curling plaintiffs. We have been asking the defendants

1 for information so that we can look to a pragmatic solution.  
2 And what we have said for Cobb County and to Cobb County  
3 because they have machines that they have located that were  
4 last used in November of 2017 -- and we were discussing with  
5 them the possibility of switching some of those machines for  
6 the machines that they have sequestered from April and June of  
7 2017.

8 We have more information that we need from them to  
9 determine which of the machines from the April and June  
10 elections could be switched for the machines in the November  
11 election. We haven't received any information from them about  
12 the November election machines.

13 As soon as we have that information, we -- the  
14 Curling plaintiffs are prepared to have a solution that will  
15 allow those machines to be released. But we just need this  
16 information from them before we can come to those -- to a  
17 conclusion about the numbers that will work.

18 THE COURT: Well, let's just deal with that issue.  
19 What is the impediment to providing that information?

20 MS. JOHNSON: Your Honor, this is Dekalb County. We  
21 had provided some information. But we share concerns with Cobb  
22 County about providing serial numbers for DRE machines without  
23 some kind of a protective order because under the state  
24 regulations --

25 THE COURT: All right. You can get a protective



1 order. That is not the issue. It can't be the issue.  
2 Everyone understands you can have a protective order. So that  
3 should have been a given. They are not --

4 MS. JOHNSON: Beyond that, we have attempted to  
5 provide some information and we're preparing to provide more.  
6 But just the tenor of the email conversation made it clear that  
7 providing more information was not going to resolve the release  
8 of the machines in time for us to use them. Because, in fact,  
9 the May 2018 election is already going on through early voting  
10 and our election people are having to prepare machines right  
11 now for use in the ultimate election.

12 And so we really don't have time to wait for these  
13 machines to be released. We really do need them released now.

14 **(Unintelligible cross-talk.)**

15 MR. ICHTER: Your Honor, this is Cary Ichter. This  
16 is a problem of the counties' creation. The Court's  
17 December 15 order doesn't have any exceptions for the idea  
18 that, you know, if we wait until the last minute to have a  
19 discussion about what the needs from an evidentiary standpoint  
20 are of the parties in this case that we can somehow manipulate  
21 the Court into releasing machines that have relevant evidence  
22 on them so that we can do our jobs.

23 There is a way to do this. And it is done all the  
24 time in connection with electronically-stored information in  
25 these kinds of cases. That is just what we're dealing with,

1 electronically-stored information. We're in this all the time.  
2 Mr. White can talk all he wants about how it is tougher than it  
3 sounds. But this occurs every day in litigated cases. And if  
4 it is tough, then the county should have started sometime back  
5 around December when the Court issued its order.

6 MS. CHAPPLE: Your Honor, this is Catherine again  
7 with the Curling plaintiffs. Part of the issue and the holdup  
8 is that the information we have received from the counties  
9 hasn't been reliable. For one of the counties, we received  
10 handwritten records. Everything was in handwriting, illegible  
11 serial numbers. So there were serial numbers that were listed  
12 more than one time.

13 When we added it all up -- we had statistical experts  
14 on the call with the parties last week. And they were asking  
15 questions and trying to get information from the county. When  
16 we added it all up, it didn't match the numbers that the  
17 counties have said -- of machines the counties have said that  
18 have been sequestered.

19 So due to the things that we're running into -- and  
20 we're working as hard as possible and, you know, doing what we  
21 can with the information that we have in trying to get  
22 additional information because we understand the need here and  
23 the need for the machines -- although I will say that on the  
24 call last week, Cobb County stated that it had the machines it  
25 needed for May. So this is sort of the first time that we're

1 hearing that they need machines for an election in two weeks.

2 **(Unintelligible cross-talk.)**

3 MR. WHITE: Your Honor, this is Daniel White. Cobb  
4 County told them in the phone conference last Thursday that we  
5 had enough machines, but that was with the understanding that  
6 we -- Cobb County was holding the machines from April and June  
7 of last year.

8 It was the next day that emails started flying from  
9 plaintiffs' counsel saying we're shocked that these other  
10 machines have been prepared for elections. So we have -- and I  
11 don't want the Court to get the impression that Cobb hasn't  
12 done anything. Cobb County has gone and created a record that  
13 we aren't required to keep in the course of business to  
14 identify every machine that has been used since 2016 and which  
15 elections. We have sent that spreadsheet to them. We  
16 protected the serial numbers, which we feel like we're supposed  
17 to do under state law. But we have identified every machine.

18 The only thing we haven't given them is which  
19 precincts the machines were at. And we think that that  
20 violates the State Admin Regulation Code. So we've come a long  
21 way towards identifying every single machine we have available  
22 and in what election they have been used and have asked them to  
23 come forward with a reasonable sample size. And they are  
24 saying, no, we want to move into discovery and find out more  
25 information about these machines than what is on them. And

1 that is not okay with us. We objected to that.

2 But we did move towards them and identify all of  
3 these things on behalf of Cobb in terms of what machines we  
4 have, what elections they were used in. We just haven't given  
5 them the serial numbers and precinct location.

6 MS. CHAPPLE: This is Catherine with the Curling  
7 plaintiffs. We do appreciate the -- I feel like there has been  
8 a serious cooperation in a lot of ways. But it is -- without  
9 the information about the precincts and the serial numbers for  
10 the machines, it is impossible for us to put together the  
11 sample that we need.

12 And so we absolutely need that information. And if  
13 there is some sort of request that we need to put in, we'll do  
14 that. But we haven't -- we haven't heard from defendants what  
15 we need to do to get that information, if there is a separate  
16 step that they need us to take.

17 THE COURT: What is --

18 MR. ICHTER: Your Honor, this is Cary Ichter. We  
19 agree with that. We need the serial numbers. We need the  
20 precincts. But we also in order -- as I said, we're not  
21 looking at sample size. This is not a question of sampling.

22 We'll do a lot of wasting of time if we're basing  
23 everything on taking a look at hundreds upon hundreds of DREs  
24 looking for a needle in a haystack. What we need to do is  
25 narrow down our universe of suspected machines by taking a look

1 at anomalies that our experts will identify that narrow the  
2 field and immediately upon getting that kind of information  
3 will enable us to release sequestered machines that are being  
4 held on to by the other side.

5 But we don't have to sequester anything if we can  
6 start making mirror images now. And I would hasten to add that  
7 we have never, ever said that we want to move into discovery  
8 now. We have avoided using any kind of language like that  
9 because that is not what we're looking for.

10 We have been looking for a way to accommodate the  
11 competing legal obligations that the defendants have by coming  
12 up with a solution that resolves this for everybody. It  
13 resolves it for the Curling plaintiffs, Coalition plaintiffs,  
14 and the defendants by simply doing what everybody else does  
15 with electronically-stored information: Making an image of it  
16 so that you can use your computers for additional work.

17 MS. CHAPPLE: This is Catherine with the Curling  
18 plaintiffs. We feel that we will need to sample some of the  
19 machines -- the physical machine.

20 THE COURT: All right. Well, first of all, let me  
21 just --

22 **(Unintelligible cross-talk.)**

23 THE COURT: All right. Let me ask you this: How  
24 long -- has the State prepared a mirror image of any of the  
25 machines and cards?

1 MR. SALTER: I don't believe so. This is John  
2 Salter, Judge. And I don't believe that was -- I don't believe  
3 that was something that we were doing.

4 THE COURT: Has anyone --

5 MR. SALTER: Part of the problem --

6 THE COURT: Let me just ask you this. Let me follow  
7 up on that. How -- have you tried to determine how long it  
8 will take to do that? I mean, for instance, just for one  
9 machine so we could just understand what we're facing here.

10 **(Unintelligible cross-talk.)**

11 MR. SALTER: Your Honor, I honestly don't know the  
12 answer to that.

13 MS. RINGER: We have no idea how long it would take.  
14 We welcome the idea but at the defendants' -- I mean, at the  
15 plaintiffs' cost.

16 THE COURT: I understand that. But I'm just saying  
17 you can -- it could be done next week, I believe. But, you  
18 know, I'm not --

19 MS. RINGER: I don't know. This is the first time  
20 that Mr. Ichter has said that.

21 MR. ICHTER: Your Honor, this is Cary Ichter. I have  
22 been talking about this since I entered the case.

23 THE COURT: All right. I'm going to --

24 MR. WHITE: Your Honor, this is Daniel White. Part  
25 of the problem is we were moving towards a sampling solution

1 last fall with prior counsel. And then this spring it has  
2 emerged that one group of plaintiffs seems to want to stick  
3 with the sampling and the other group seems to -- they just  
4 want all images of everything. So we don't know who we're  
5 negotiating with.

6 THE COURT: I understand. And they want something  
7 different. And it makes it very challenging. But at the same  
8 time, this has been a drumbeat that you-all want to get the  
9 information. You want to get the machines back into play. And  
10 at the same time you don't want to provide the information on  
11 precinct number and machine number.

12 And I mean -- you know, so it is -- at one level, I  
13 don't think that there is -- that you have done what you need  
14 in order to get ahold of the machines. And I'm concerned -- of  
15 course, I want you to have the machines. And at least -- I  
16 mean, this all seems so absolutely resolvable.

17 I tell you what is that one of you -- Mr. Ichter,  
18 have you talked with any of your experts about basically what  
19 they determine will be the type of cost and time involved in  
20 mirror imaging of a typical DRE machine?

21 MR. ICHTER: Your Honor, what we have -- this is Cary  
22 Ichter. What we have done is we have asked the other side to  
23 provide us with user manuals so that we know what the kinds of  
24 configurations are that these machines are in, exactly what  
25 kind of machines they are using. We have asked to meet with

1 the Secretary of State's office. We have asked to get the  
2 backup procedures for these machines so that we understand how  
3 they are backed up and what kind of data is retained.

4 And we have been stiff-armed 100 percent on all of  
5 that. The Secretary of State's people refused to even meet  
6 with us. Nobody from the counties has given us the first piece  
7 of operational technical detail about the machines. So it is  
8 impossible for us to come up with that information. If they  
9 will supply us with that information, we could come up with an  
10 estimate.

11 **(Unintelligible cross-talk.)**

12 THE COURT: All right. I'm going to go offline right  
13 now. I'm sorry. I'm going to go offline for a few minutes to  
14 consider where you are all at so we can have a productive  
15 discussion about this because I don't think we're making any  
16 progress.

17 So just know that I can hear you. Though you can't  
18 hear me. So you don't need to say anything to each other if  
19 you don't want to. You are welcome to talk, but I'm going to  
20 hear everything you say. All right.

21 MR. ICHTER: Thank you, Judge.

22 **(A brief break was taken.)**

23 COURTROOM DEPUTY CLERK: Counsel -- Counsel, the  
24 Court is rejoining the conference call.

25 THE COURT: Hi. All right. So, Ms. Chapple, why is



1     it that -- let me just try to determine why is it that you  
2     would need to have -- you want to have some machines and how  
3     many of them would you need if, in fact, the mirror image of  
4     the machine and the cards are being made.

5             MS. CHAPPLE: Yes, Your Honor. This is Catherine  
6     Chapple. We, in speaking with our computer scientist and the  
7     experts that would be doing the forensic analysis, believe that  
8     they would need a handful of machines -- it would be a much  
9     smaller sample of the physical machines -- to look for  
10    vulnerabilities in the physical aspects of the machine.

11            THE COURT: So how many machines are we talking  
12    about -- then about?

13            MS. CHAPPLE: So I don't have a number from them.  
14    But I think it would be very small compared with what we're  
15    talking about in the software sort of type of vulnerabilities.

16            THE COURT: All right. Well --

17            MR. SALTER: Your Honor, this is John Salter. May I  
18    add something here?

19            THE COURT: Yes.

20            MR. SALTER: My recollection -- and I was responding  
21    to my brothers and sisters a moment ago. But my recollection  
22    when me and Grant Schnell and Robert Highsmith and Roy kind of  
23    came into the case in the fall, there was a great deal of angst  
24    and anxiety about the preservation duty and how broad and how  
25    absolute that would be. And there was a great deal of

1 back-and-forth, some of you which you ended up being privy to  
2 and an actual participant in and some which, of course, you  
3 were not.

4 And my concerns here as representing the state and  
5 the State Elections Board is that the county defendants and the  
6 state have in good faith operated under an understanding that  
7 that -- a certain understanding of that December 22nd order  
8 wherein we voiced in the lead-up to it in one of these status  
9 conferences that we really did need to know that we would have  
10 enough machines available for the spring elections of 2018.  
11 And the allegations are really concerned about these discrete  
12 elections that had already occurred.

13 And further understanding the state of the complaint  
14 at the time -- and I think this still holds true -- in other  
15 words, the effect is one that is inherent in every machine if  
16 the complaint is to be believed, it seemed to us logical that  
17 we would -- that that would not lead to anybody's prejudice.  
18 Certainly that was not our intent.

19 What I am concerned about is that we had a conference  
20 call for an hour -- almost an hour and a half last week. Less  
21 than, you know, 12 hours after it occurred, the object being  
22 rotating some of these machines back into service, the position  
23 that came across was we're so -- we're so surprised that you  
24 are spoiling evidence, deleting evidence, we're getting our  
25 sanctions motions ready. In the meantime, we insist that you

1 embargo pretty much every machine because you are actively  
2 destroying data by continuing to do elections.

3 That is in my view and the position of my clients,  
4 Your Honor, is that what we're now doing is we're getting  
5 around the fact that we don't know what the complaint is. The  
6 motions to dismiss are not ruled on. Discovery would be  
7 barred. But what we're doing is we're getting an injunction  
8 de facto against us because of what I view are a flipping of  
9 position and an opportunistic expansion of their interpretation  
10 of our obligations. And that is my concern.

11 THE COURT: All right.

12 MR. SALTER: And I'll --

13 **(Unintelligible cross-talk.)**

14 THE COURT: I'm really not -- I'm going to tell you  
15 what I'm thinking. All right. You can all argue obviously  
16 endlessly. But let me just say that I don't think we would be  
17 in this position, first of all, Mr. Salter, if we didn't have a  
18 wipeout that was done at Kennesaw of the state election base.  
19 So we got -- and that happened at the time of this lawsuit.

20 So I'm just -- I think that we have a context here  
21 that I can't completely ignore. Because there would have been  
22 a very simple way of proceeding with this but for that. But  
23 what I --

24 MR. SALTER: Your Honor, may I --

25 THE COURT: No. I'm really not asking you to

1 interrupt me at this point. So I'm just -- what I don't  
2 understand right at this moment is if, in fact, the plaintiffs  
3 are prepared -- and I don't know that they are prepared to do  
4 this -- to assume the cost of doing basically the mirror  
5 imaging of the machines and cards and do it on an emergency  
6 basis with obviously paying for you-all to do it. Because I'm  
7 sure you don't want all of their technicians. But if you do,  
8 you can agree upon a contractor to do it all. That is not a  
9 problem.

10 It would seem like with doing that, plus identifying  
11 a handful of machines as Ms. Chapple said so that her folks can  
12 test it, that that would basically at least for now resolve the  
13 pragmatic issue.

14 So explain to me why that would not be a viable  
15 solution at the moment, or maybe you will agree that it is a  
16 viable solution. I don't know what the cost is. You know, I  
17 don't know anything about that. But I view it as ultimately  
18 the plaintiffs' cost. Of course, if the plaintiffs were to  
19 prevail in the litigation, you could seek reimbursement. But I  
20 don't know that you are going to. I don't know what you are  
21 going to get past.

22 I'm not seeing this as discovery. I am seeing it as  
23 preservation -- necessary preservation of evidence though.

24 MS. CHAPPLE: Your Honor, this is Catherine Chapple  
25 with the Curling plaintiffs. As long as we were also able to

1 get the information that we need regarding the serial numbers  
2 of the machines, the precincts, and that other (unintelligible)  
3 that would allow us to know what machines they have and to  
4 identify with reasonable certainty what has been sequestered  
5 and how we would go about imaging them, I think we need to --  
6 so clearly the Curling plaintiffs have not been -- are not as  
7 far down the road with the idea of imaging as the Coalition  
8 plaintiffs are. And we would like the opportunity to discuss  
9 with our experts that we are, of course --

10 **(Unintelligible cross-talk.)**

11 THE COURT: All right. I hear you. I'm just -- and  
12 I think that you-all -- I understand why you need the precinct  
13 number and the serial number because the serial number might be  
14 relevant to a whole series of machines that are defective or  
15 not defective. But -- and it might not be. But I can  
16 understand that. I can understand why you want it by precinct  
17 as well.

18 And I have said already I think that that is  
19 appropriate. But there needs to be a confidentiality order.  
20 But -- and if you consider -- I guess your folks would have to  
21 make a decision.

22 I'm telling you I am not going to be available at all  
23 come 3:00 on Friday. And we have to have -- I have sentencing  
24 hearings all of tomorrow. So, you know, if we have to resolve  
25 this tomorrow night in court, we'll do that and have you come

1 down.

2 But I think that is -- you know, if the Coalition  
3 folks at this point think that is what is critical for them,  
4 then you might end up ponying up all the money yourself. But  
5 then it is -- it is a different -- just simply in order to get  
6 this resolved now.

7 But I think you need to look at -- I don't know how  
8 long it will take. I don't know whether -- what the State's  
9 perspective is. But that is what I need to know right now.

10 **(Unintelligible cross-talk.)**

11 MR. ICHTER: Your Honor, this is Cary Ichter. Can  
12 I -- can I speak since we're talking about my client paying for  
13 this?

14 THE COURT: Yes.

15 MR. ICHTER: I hasten to note that it is an nonprofit  
16 organization. And I understand the direction that the Court is  
17 heading in. Could we be allowed an opportunity to brief the  
18 question of the shifting of the cost of the counties'  
19 preservation to the plaintiffs? That is the first question.

20 But almost as -- and perhaps more importantly, when  
21 we get to the preliminary injunction phase, I think that it is  
22 important for the Court to remember what the defendants are  
23 essentially saying. The sort of submerged text here is that,  
24 well, they say it is inherently defective, and they ought to be  
25 able to prove that with a very small sample size; so therefore

1 they should only need a very small number of machines.

2           Implicit in that argument is that the mere showing of  
3 inherent vulnerability should be sufficient to carry our burden  
4 at the preliminary injunction stage because that is essentially  
5 what they are saying. That is all -- this is all the evidence  
6 that they need. They only need to show that it is inherently  
7 vulnerable. Well, if that is fine, fine. We'll accept that.

8           THE COURT: I'm sure they are not saying that.

9           MR. ICHTER: But I'm hoping -- I don't think that  
10 they are saying that. But they are essentially saying that the  
11 only evidence that we are entitled to pursue is inherent  
12 vulnerability. And I think that we only need to look at what  
13 happens out there in data breaches to understand that everybody  
14 is inherently vulnerable, and the question is who is a victim  
15 of vulnerabilities being acted upon.

16           MR. BARNES: Your Honor, this is Roy Barnes. I have  
17 been very quiet. May I say a few words on behalf of the state?

18           THE COURT: You can say a few words if it is going to  
19 be helpful to getting this resolved.

20           MR. BARNES: Well, I hope so.

21           THE COURT: All right.

22           MR. BARNES: Your Honor, the first thing is there is  
23 a difference between the plaintiffs as you just heard. The  
24 Curling plaintiffs say that --

25           THE COURT: All right. I understand the differences

1 in the postures. But I think that ultimately my own judgment  
2 is going to end up needing the mirror image. But that is  
3 something different.

4 MR. BARNES: And the second thing that I would  
5 like -- and we have -- Mr. Salter and I have proffered with our  
6 clients. And here is our position so that it can be very  
7 clear.

8 This case is still closed. We think that there is  
9 immunity in the case as we have set forth. We want the process  
10 of a regular case, that is, a person comes forward and says,  
11 I've suffered this specific harm, and this is what I want to be  
12 proved, and we believe that the immunity gives -- allows us --  
13 that issue needs to be decided first because either side could  
14 appeal that as a collateral order.

15 And so before we get into all of this, it is our  
16 position respectfully that we decide the immunity issue. The  
17 case is not even open. And this case go back to a regular case  
18 rather than policy decisions. We think that this has happened  
19 or this may have occurred and we are talking about two weeks  
20 before the election. The election is two weeks from Tuesday.  
21 And we think that that orderly process ought to follow.

22 Now, the other thing too about turning over serial  
23 numbers and manuals and all of this, which would be contrary to  
24 state law to do so is, as Mr. Salter says, what they are trying  
25 to do by litigation holds is what they cannot do by a proper



1 pleading before the Court either for injunction or otherwise  
2 from which we would be able to assert immunity.

3 THE COURT: Governor, I think you've made -- I think  
4 you've all made your point, and Mr. Salter made the point, and  
5 I understand that.

6 But what would you have? That you would also say  
7 we're going to eliminate all evidence in this case because we  
8 need these machines and we have done nothing to -- basically  
9 ourselves mirror image them in order to be able to have free  
10 access to them ourselves in the last number of months?

11 I mean, the positions of the plaintiffs obviously has  
12 significant issues. But I also think so does the problem of  
13 the defendants, especially in the context of what happened at  
14 Kennesaw. So, you know, I think that really -- you know, I'm  
15 not saying what they can do with anything.

16 I'm just trying to say, if the plaintiffs are willing  
17 to pay for the mirror imaging and either the state can do it  
18 itself or the counties can do it itself and they can -- or you  
19 can hire -- obviously everyone has their own jobs. Though it  
20 may end up having to be an independent entity. But it is  
21 simply preserving evidence. And you need the machines, and I  
22 don't know that they are going to even end up having access to  
23 this ever.

24 But if they want to pay for it, it is simply a matter  
25 of preservation. I understood what was being said about the

1 nonprofit. But so is, so-to-speak, the state and the community  
2 are the essence of a nonprofit entity. So I'm not sympathetic  
3 to that. So I just --

4 MR. ICHTER: They are a little more flush with cash.

5 THE COURT: They are more flush with cash. But,  
6 nevertheless, the reason -- the reason I said that ultimately I  
7 think it will come down somewhat to this, even though I  
8 understand that the plaintiffs -- the Curling plaintiffs want  
9 the precinct number and the server number so that they have --  
10 it could ultimately do a sample. The reality though is that  
11 we're going to continue to have this problem about the data if  
12 the case moves forward. And so -- and, you know, you're going  
13 to want your machines, and they have to be serviced. So there  
14 has to be a resolution of this.

15 And I just don't understand why that resolution, if  
16 the plaintiffs want to pay for it, is not ultimately the  
17 resolution along with at least some precinct and server number  
18 information, even if it means right now you simply make  
19 generally the information and you are holding the information  
20 until the point that I would rule on any of the dismissals  
21 because they don't need to be doing it until later -- they  
22 don't have any need for the information until they can get past  
23 the motion to dismiss point. But I want -- in the event they  
24 do, I want there to actually be meaningful data available.

25 MR. ICHTER: Thank you.

1                                   **(Unintelligible cross-talk.)**

2                   MR. BARNES:  If I could just reply to that.  
3   Number 1, we'll be glad to show you about Kennesaw and the -- I  
4   mean, that is the red herring in the whole deal.  But we won't  
5   get into that today.

6                   THE COURT:  All right.

7                   MR. BARNES:  I think it is, of course, the state --  
8   it is the counties that have custody and control of the  
9   machines.

10                  THE COURT:  Right.

11                 MR. BARNES:  And that is -- so it is really an issue  
12   addressed to them.  But, secondly, we think it is critically  
13   important that before, even if there is some information that  
14   is mirrored or whatever, that we have a complete vetting of  
15   people that are going to get that information because we  
16   have -- we have a duty under state law to make sure that is  
17   true and that they pass -- that they be folks that we have the  
18   right to vet because you're talking about very sensitive  
19   information.

20                 THE COURT:  Well, surely the state has its own  
21   contractor for handling this in very sensitive situations.

22                 MR. SALTER:  Your Honor, this is John Salter.  I  
23   don't know that they can even do this in -- I do not know that  
24   this is feasible without compromising the machines.  And I  
25   don't want to mislead the Court and then have to raise that

1 issue down the line and be thought to be making a reversal or  
2 shifting of our position.

3 We do not yet know whether or not even the  
4 sampling -- you know, the idea that we're going to get in there  
5 and find which machines are more prone to vulnerability is  
6 different from a random sampling where we just hold out a  
7 certain number of randomly picked machines.

8 What Mr. Ichter has arrived at is a much more  
9 intrusive sifting process more akin to we would say basically  
10 viciating the immunities of the state and moving into  
11 discovery. And I think it puts us in a different place. And I  
12 think we're going to have to think about how to do that.

13 But I know that will involve pretty extensive  
14 consultation before we can take a firm position on that. Thank  
15 you.

16 MR. CROSS: Your Honor, this is David Cross. Could I  
17 just perhaps make a proposal that might move things forward?

18 THE COURT: All right.

19 MR. CROSS: On the issue of confidentiality or any  
20 other regulatory hurdles, if we could just get a proposed  
21 protective order from the defendants in the next day or so that  
22 lays out whatever protections they believe they need to share  
23 the data, I think that would move things forward very quickly.

24 And we're happy for my clients -- for the Curling  
25 plaintiffs, we're happy to try to work that out with them so we

1 can take that issue off the table.

2 The other thing that would be useful -- and  
3 Mr. Salter and I started talking about this when you stepped  
4 off the call -- is if we could get a follow-up meeting with the  
5 defendants, particularly the counties since they have these  
6 machines, and have the sort of robust exchange of information  
7 that Ms. Chapple has described.

8 When I say robust, it is actually not that much. We  
9 just need to nail down things like the categories that she has  
10 articulated. And then our statistical experts are ready to go  
11 forward with some sort of proposal on our side. And that will  
12 involve imaging machines no doubt. But I was prepared to  
13 figure out if we could do it on a statistically significant  
14 sample size and help the state move forward with the election.  
15 And --

16 THE COURT: And you can do this in the next two  
17 days -- two or three? I mean, they have to service these  
18 machines as well is my understanding.

19 MR. CROSS: Well, our hope for my clients is that we  
20 can figure out a statistically significant sample that enables  
21 us to identify specific machines. And then those machines will  
22 get preserved either as they are or taking an image of them.  
23 If they don't need them for the election, then I think they  
24 could just sit and be preserved in place.

25 Beyond that, I would leave that to the Coalition

1 plaintiffs to figure what else they may want preserved. We're  
2 trying to figure out if we can get to a statistically  
3 significant sample size. And if we can get the information we  
4 need from them, then our statistical experts tell us we could  
5 put that proposal together quite quickly. And I think we could  
6 work it out. But we need to get this information from the  
7 defendants. We need them to do that. And we haven't been able  
8 to do that so far.

9           The last thing I just wanted to say is: I am  
10 sympathetic to Mr. Salter's point and others have made that  
11 notions of spoliation and sanctions start to inflame things. I  
12 will make a commitment that for my clients we have intention to  
13 be talking about spoliation or sanctions. We obviously are  
14 reserving all our rights.

15           But my only intention at this point is to try to  
16 figure out can we preserve as little as we need for our claims  
17 without prejudicing our client's claims. And we're prepared to  
18 move forward with our experts as quickly as possible on that.  
19 And we'll park any notion of whether something was lost  
20 historically or whether it is lost going forward later.

21           But I would like to have a very pragmatic approach to  
22 this and let's just get the legal arguments out of the way and  
23 focus on exchange of information. We will move as fast as we  
24 can. We have experts ready to go.

25           THE COURT: Well --

1 (Unintelligible cross-talk.)

2 MR. ICHTER: If I can agree with that, we agree that  
3 if we can sit down with the other side -- if there is an order  
4 that we immediately sit down that some of the information that  
5 we have been looking for is disclosed to us so that we  
6 understand some of the information necessary to be able to make  
7 some decisions about what is the universe that we need, then  
8 we'll be light years ahead of where we are right now. And  
9 there will be room for compromise.

10 But they are asking us to shoot in the dark right  
11 now. And we have been asking for meetings and data for a week  
12 since the -- since the all-hands conference call last week. So  
13 I agree entirely with Mr. Cross.

14 (Unintelligible cross-talk.)

15 THE COURT: So y'all have not had a meeting in  
16 person? There has not been a meeting in person?

17 MR. SALTER: Your Honor, this is John Salter. We had  
18 an hour-and-15-minute call on May the 4th. I think that was  
19 last Thursday afternoon. And the very next morning, almost  
20 before I got into work, having thought we had an  
21 all-hands-on-deck constructive call, we get this email from  
22 Mr. Ichter that, you know, our spoliation motion is being  
23 prepared. It is imminent.

24 And really what we have here is a situation where the  
25 DRE machines are the hostage to a preservation issue that has

1     been expanded much beyond its intent. And they want to shoot  
2     the hostage. I mean, the thing is they don't like the  
3     machines. That is the issue. In my view this is really --  
4     this really is just an injunction by another name where they  
5     hold out, threaten spoliation, hold us up on evidence  
6     preservation, and they don't care if the machines can't get  
7     used because that is what their lawsuit wants.

8             THE COURT: All right. Who is ready to come down to  
9     the courthouse tomorrow?

10            **(Unintelligible cross-talk.)**

11            THE COURT: Who is ready to come down to the  
12     courthouse tomorrow morning? I mean, I'll set a room up for  
13     you.

14            MR. SALTER: This is Salter -- this is John Salter.  
15     I've got -- me and Roy have a hearing at 9:00 that is expected  
16     to last half a day tomorrow morning.

17            THE COURT: Okay. But we need county representatives  
18     more than you, don't we? I mean, it is --

19            MS. JOHNSON: Your Honor, Dekalb County's lead  
20     counsel is out of the country until Monday. We could send  
21     someone. But we're not going to have all the details at that  
22     time.

23            MR. ICHTER: Your Honor, this is Cary Ichter. I can  
24     be there any time you want me.

25            **(Unintelligible cross-talk.)**



1 UNIDENTIFIED SPEAKER: -- can be there when we need  
2 to be.

3 MR. WHITE: Cobb County can be there. I want to say  
4 that just the reality is -- and we are willing to meet, and we  
5 have offered and spoke with actually Mr. Cross and his  
6 associates earlier about doing the protective order. So we're  
7 not against that idea. Today is the first we have heard of  
8 anybody offering to pay for mirror imaging or anything of that  
9 nature. That is another bridge we can cross.

10 But I do want to point out one complication for us is  
11 we are literally down to one employee. The information that we  
12 were able to turn over this weekend was made by the director  
13 over the weekend.

14 Everybody else right now is all hands on deck rolling  
15 these machines out, getting the precincts ready, running  
16 advanced voting, and -- you know, so the idea that this is just  
17 something that can be just done easily in the middle of  
18 preparing for an election two weeks out is not -- that doesn't  
19 mean we're not willing to talk. And I will ask Ms. Eveler to  
20 make herself or whoever from her staff can be available to do  
21 this. But they are in the busiest part of their jobs other  
22 than a presidential election or a general election. So it is a  
23 very difficult time.

24 THE COURT: And I understand that. And I don't mean  
25 to be in any way dictatorial about this. But I am just trying

1 to get you to a point of having at least an interim pragmatic  
2 resolution. And you need -- you know, I want -- it doesn't --  
3 when I hear that you need -- that Dekalb needs 450 machines and  
4 Cobb says it needs all of the machines, I mean, that is really  
5 obviously -- and I don't know if the 450 are all machines or  
6 not or there are 750 or not. I don't know those numbers.

7 And I just can't believe that there is not some  
8 interim pragmatic resolution. It may not be the long term  
9 resolution. But the interest -- ultimately the reason I  
10 started the conference was to address the county concerns. Not  
11 to try to take care of the plaintiffs. But simply to try to  
12 address the concerns that the counties had.

13 And it was part of just the entire resolution here.  
14 So that is really -- that is where we're at. It is not a  
15 hostage situation. It is a matter of what is an interim  
16 solution so you can have -- whatever you think is necessary  
17 given the projected turnout, which I don't know that the  
18 projected turnout is great either. But maybe it is.

19 **(Unintelligible cross-talk.)**

20 THE COURT: I didn't hear you.

21 MR. WHITE: Your Honor, this is Daniel White. I  
22 don't want the Court to misunderstand. I don't need all the  
23 machines released.

24 What I was trying to point out was that Cobb County  
25 agrees to move forward without, you know, releasing -- without

1 having to release any of the machines. But that was when the  
2 understanding was we were only talking about April and June.

3 What happened is the next morning we got told or  
4 sanctions letters threatening saying we need to mirror image  
5 all of your machines since 2016, in essence. So that is where  
6 the misunderstanding was. We have already withheld all 40  
7 machines that we have that haven't been touched since 2016 and  
8 we're willing to keep those aside.

9 MS. JOHNSON: Your Honor, Dekalb has more than 1,000  
10 machines currently sequestered, and that is why we need some of  
11 them back. Because we simply need enough to be able to conduct  
12 this election. And our election supervisor is asking for the  
13 Court's help with that.

14 I mean, we are not unwilling to participate in  
15 efforts to preserve documents. But I'm just going to question  
16 whether it is going to be practical to do a mirror imaging of  
17 hundreds of machines during an election when, like Cobb County,  
18 all of our elections folks are working hard to try to get this  
19 election going without a lot of their machines.

20 THE COURT: Right. I get it. I understand.

21 MR. MCGUIRE: Your Honor, this is Robert McGuire. I  
22 just want to be very clear. We're not looking to inconvenience  
23 the counties. We wanted to get a meeting to get information so  
24 that we can minimize the inconvenience by targeting the  
25 machines we are interested in.

1           And if we could just sit down with -- the Secretary  
2 of State is very important because the Secretary of State has  
3 answers that we think the counties won't have. If we could sit  
4 down with them, we can target the machines. And then we don't  
5 need to do hundreds of copies with lots of costs, which have to  
6 be shifted or not shifted.

7           Our goal is to minimize the inconvenience and  
8 maximize the preservation of what we need. We're not trying  
9 to -- we're not trying to get them to mirror image everything.  
10 That is the worst solution from our perspective and from  
11 theirs. So our sole --

12           THE COURT: So let me ask you this. When the  
13 machines are put into use, are they wiped at that time or is  
14 the current data preserved on it?

15           MS. JOHNSON: Your Honor, my understanding --

16                           **(Unintelligible cross-talk.)**

17           MS. JOHNSON: Your Honor, my understanding is that  
18 the machines do archive some information but that the  
19 plaintiffs objected to using the archived information.  
20 However, I have entered this case late because our counsel is  
21 out of the country.

22           MR. CROSS: My understanding from the discussion we  
23 had with the defendants last Thursday was that the machines go  
24 back into use. While there may be some data that is archived,  
25 the machines are wiped. And so that's where the concern comes

1 from and again why we are trying to get down to some reasonable  
2 number for physical sampling otherwise.

3 I would just come back to the proposal I made, if I  
4 could, Your Honor, and figure out what time frame do the  
5 defendants, the state and counties, need to be able to meet  
6 with us -- if not tomorrow, then maybe Friday, if I've got my  
7 days right -- to have the sort of exchange of information we  
8 need for at least our clients to have a statistical sampling  
9 methodology and try to move this forward. Because that is the  
10 only hurdle is just the limited number of categories of  
11 information we need. And then we can wrap this up for  
12 preservation purposes.

13 **(Unintelligible cross-talk.)**

14 MR. BARNES: Your Honor, the position of the state is  
15 that we are not going -- unless the Court orders and decides on  
16 the immunity issue, we're not going to turn over secret  
17 information to the plaintiffs. And that is the reason I made  
18 my little speech awhile ago.

19 The second thing is just an observation. If the  
20 machines are inherently defective like they say, what  
21 difference does it make which election you pull? Because they  
22 should show all of it at every time. And this is what happens  
23 when you have folks that -- that really don't -- respectfully  
24 don't have a clear view of proof of any abuse.

25 And so I mean, if they are inherently defective, it

1 is going to show up in every election that occurs. So what  
2 does it matter whether there's others that are preserved? But  
3 the state's position I have been instructed -- and I do not  
4 disagree with them -- is that we -- that we are not going to  
5 turn over confidential and state secret information unless  
6 ordered to do so by the Court and with a right to appeal on the  
7 immunity issue.

8 **(Unintelligible cross-talk.)**

9 MR. CROSS: Your Honor, if I could just respond real  
10 briefly. Mr. Barnes' comments epitomize the problem we have  
11 run into --

12 COURT REPORTER: I don't know who is speaking.

13 THE COURT: I'm sorry. Who is speaking?

14 MR. CROSS: I'm sorry, Your Honor. This is David  
15 Cross -- David Cross again for the Curling plaintiffs.

16 THE COURT: Yes. Go ahead.

17 MR. CROSS: Mr. Barnes' comments epitomize the hurdle  
18 we have hit, which is they are taking the position that things  
19 like serial numbers, which our statistical experts tell us they  
20 need, is secret information. And so absent an order from the  
21 Court that requires them to disclose -- again, just narrow the  
22 categories of information, like serial numbers, precincts, we  
23 can't move forward. And we're only looking for it for  
24 preservation purposes, not broader discovery.

25 The second point I'll make on what Mr. Barnes, Your

1 Honor, had to say is we are trying to move this forward as  
2 quickly as possible. And part of the challenge we have is that  
3 the defendants kind of want to have their cake and eat it too  
4 because if they realize -- I think Mr. Ichter has explained it  
5 before. If the defendants will waive any defenses -- any  
6 arguments right now that any sample size we take or any number  
7 of machines our experts rely on, that those are necessarily  
8 representative and reliable as to the broader universe, then  
9 maybe this gets a lot easier.

10 But I have not heard that waiver from them, and we  
11 cannot now just haphazardly choose some number of machines and  
12 then have them come in later and say, well, those machines  
13 actually are not representative of the broader universe. You  
14 did not do a statistical sample. It is coming and going both  
15 ways.

16 THE COURT: You know, the thing is this. I'm not  
17 sure -- I really believe that -- Mr. Cross, I understand that  
18 you have been trying to say that if we can have this  
19 information then we could preserve a smaller number of them and  
20 it is in their interest. And we can have a confidentiality  
21 order. You could be -- it could go directly to the experts.  
22 It could be -- there are any number of ways that could be  
23 worked simply so that it is -- though a smaller number of  
24 machines are preserved. That is one solution. And it seems  
25 like a reasonable one.

1 But I hear Governor Barnes saying, no, we're going to  
2 object to anything even though the counties may or may not  
3 agree to do this in terms of the machine numbers. I don't  
4 really understand that position of the state. And that is why  
5 I was trying -- even though I thought it was more burdensome in  
6 its own way to have to image everything, that is -- you know,  
7 it clearly was intended as a way of, again, providing a  
8 pragmatic solution. And no one needs to have -- there are  
9 obvious methods for being able to deal with ensuring state  
10 security with that. But --

11 MR. BARNES: Hello. Hello.

12 THE COURT: We are here.

13 MR. BARNES: I'm here. I just -- y'all broke up on  
14 me.

15 THE COURT: Well --

16 MR. BARNES: I heard the -- I heard you when you said  
17 -- where I heard was you don't understand the state's position.

18 THE COURT: What I said that it is a pragmatic,  
19 narrow solution and that the state says it will interfere with  
20 and -- that it will demand that no one provide this  
21 information. That is what I heard.

22 But I think it is a narrow solution, and there are  
23 strategies for ensuring confidentiality. I mean, I don't have  
24 any time for this either. But, you know, I'm going to reserve  
25 a room here. I will make myself available.



1           When is the last sentencing? At 3:30 in the  
2           afternoon?

3           COURTROOM DEPUTY CLERK: Yes, Your Honor.

4           THE COURT: So I can't really have a hearing myself  
5           until 5:00 probably. But I'll make myself available at 5:00 to  
6           do so. But I do think -- I mean, I think it would be helpful  
7           if the -- if representatives of the county with an ability to  
8           call somebody -- a representative would come and meet with  
9           plaintiffs' counsel. And if the state wants to be there, then  
10          you could do it early in the afternoon given the fact that  
11          Mr. Salter and Governor Barnes have a hearing.

12          But I think this is very difficult to do on a  
13          conference call with me in live action, and there is a  
14          resolution, and it is not like these folks need to have any of  
15          the data other than to pick a sample. And that just -- I mean,  
16          they don't know what the serial numbers mean. It doesn't mean  
17          that they have to have any data as to the machines. It just  
18          seems to be frankly somewhat obstructive as a means for trying  
19          just to resolve a preservation issue.

20          And I hear what you are saying. And I'm just into  
21          the narrowest form of preservation or else just mirror imaging  
22          everything, and you keep it, and you take responsibility for  
23          that, and they pay it, and the state has its own contractor  
24          where it controls the secrecy itself.

25          Those are all possibilities.

1                   **(Unintelligible cross-talk.)**

2                   THE COURT: I can't resolve this. So all I can  
3 resolve is: Are you going to come here tomorrow? That is all  
4 I am going to say at this point. Are you -- we'll reserve a  
5 room, and we'll reserve 5:00 in the afternoon.

6                   And who is coming?

7                   MR. ICHTER: Cary Ichter will be there, Your Honor.

8                   MR. CROSS: Curling plaintiffs will be there, Your  
9 Honor. And I apologize. I have to drop off. So I am going to  
10 leave this to Mr. Knapp and Ms. Chapple.

11                  THE COURT: All right. That's fine.

12                  Can the county representatives be there?

13                  MR. BROWN: Coalition plaintiffs will be there. Cary  
14 and/or me, Bruce Brown.

15                  THE COURT: What about the county representatives?

16                  MR. WHITE: Your Honor, it will be difficult for Cobb  
17 County to be there. But I will do what I can. I have a wife  
18 who will be out of town. I'm not sure -- I will do what I can  
19 to make arrangements to care for the children and be there.

20                  **(Unintelligible cross-talk.)**

21                  MR. KNAPP: Your Honor, Halsey Knapp on behalf of the  
22 Curling plaintiffs will be there.

23                  THE COURT: But what I'm --

24                  **(Unintelligible cross-talk.)**

25                  MS. JOHNSON: Dekalb County can have someone present.

1 But, of course, counties are not islands. And we would need  
2 the approval of the state to do certain things in order to  
3 avoid a conflict.

4 THE COURT: So which of the state's counsel can be  
5 available earlier in the afternoon so that you can actually  
6 have a conversation about this so we don't just have a repeat  
7 at 5:00 of what just happened today?

8 MR. BARNES: Your Honor, I have got a hearing. And  
9 then I've got a speech to give. And then I'm going to  
10 Thomasville, Georgia, for another hearing that is early Friday  
11 morning.

12 Now, John, I don't know where you are.

13 MR. SALTER: As soon as we are done with Dekalb --  
14 assuming that -- and I think that is reasonable -- we could be  
15 there probably about 3:30.

16 MR. BARNES: Yeah. But I have got a speech at 5:00.  
17 But we can drive separately.

18 MR. SALTER: Okay.

19 MR. BARNES: And then like I say, I've got a hearing  
20 that started last Friday and is going to be completed. It is a  
21 trial. It is a nonjury trial that is going to be completed  
22 down in Thomasville on Friday.

23 THE COURT: Well, you've got Mr. Salter. And he is  
24 very able, to say the least. So why don't you-all try to --  
25 you're going to have to obviously share emails about what

1 information you want.

2 Why don't you -- we will save a room for you-all to  
3 meet at 3:30 in the afternoon here. And Ms. McConochie will be  
4 in touch with you about that. And I would like a  
5 representative of each county and a representative of the  
6 state. And I would like you to basically have been able to  
7 talk enough in advance to your clients and determine and --  
8 basically, you know, I can't imagine it is so difficult to  
9 figure out the precinct number and the server number and to be  
10 considering a -- I think plaintiffs' counsel needs to circulate  
11 a possible confidentiality order as to that so that you have  
12 something in advance. That you are basically walking into the  
13 meeting with that.

14 And if somebody is interested in doing the mirror  
15 imaging and assuming the cost, then you need to basically  
16 address -- be able to address that.

17 And Mr. Salter or Governor Barnes, I think you should  
18 actually make an inquiry as to find out what resources would be  
19 available in the state to assist in that if there was proper  
20 payment of costs because obviously --

21 **(Unintelligible cross-talk.)**

22 MR. BARNES: The State closes at 5:00. We'll do it  
23 in the morning.

24 THE COURT: Thank you.

25 MR. BARNES: The only other thing that I will say is

1 there is a state law and regulations that prohibit us from  
2 giving numbers out. And I know what my folks are going to tell  
3 me. They are going to say, well, I can't override the state  
4 law. I can't agree to override the state law.

5 THE COURT: All right.

6 MR. BARNES: And that is the reason --

7 **(Unintelligible cross-talk.)**

8 THE COURT: Why don't you send me the state law about  
9 the number -- that says that you can't provide a serial number.

10 MR. BARNES: Okay.

11 MR. SALTER: Your Honor, this is -- this is John  
12 Salter. We will try to do this. Because we're going to be in  
13 court in the morning and as Roy said this is -- it is after  
14 5:00. He and I are going to be in court from 9:00. We'll do  
15 what we can.

16 THE COURT: I understand.

17 MR. SALTER: I will point out that I don't know --  
18 I'm not saying it won't. But as to a protective order, because  
19 the Department of Homeland Security declares these election  
20 systems -- they are treated specially, I'm not sure a  
21 protective order will be sufficient.

22 THE COURT: All right.

23 MR. SALTER: But I'm not saying that. But I have --  
24 we have discussed that internally, and we don't know that that  
25 would do it.

1 THE COURT: All right.

2 MR. SALTER: All right.

3 **(Unintelligible cross-talk.)**

4 MR. BARNES: Go ahead.

5 MR. ICHTER: Your Honor, this is Cary Ichter. Could  
6 we ask that the Secretary of State's office have some of its  
7 technical people available to answer questions so that we will  
8 be able to know what we are dealing with in terms of being able  
9 to make mirror images. Because different kinds of systems  
10 require different kinds of approaches. And having available  
11 information will be useful in that regard.

12 MR. BARNES: Well --

13 **(Unintelligible cross-talk.)**

14 MR. ICHTER: I think the word that John was looking  
15 for that Homeland Security uses in describing these systems as  
16 vulnerable.

17 MR. SALTER: I think it is --

18 **(Unintelligible cross-talk.)**

19 MR. BARNES: Every system is vulnerable every day.

20 MR. ICHTER: I think I made that point.

21 MR. SALTER: This particular thing is treated  
22 differently under the Department of Homeland Security's  
23 protocols. That is why there is a specific national  
24 security -- a security exemption for these materials. And  
25 there is actually a Court of Appeals case that says that, *Smith*

1     *vs. Dekalb County.*

2             I do not know that we will produce this under any  
3     circumstance, Your Honor, to be quite frank with you. I just  
4     want to put that out there. I don't know --

5             THE COURT: All right.

6             MR. SALTER: And what I will not do -- although I  
7     will bring people that I can liaison with if I can get them  
8     there tomorrow. But what I will not do is subject them to  
9     interrogation by the plaintiffs' counsel. Because that might  
10    undermine the security of the system. And I'm not going to be  
11    forced to choose in a catch 22 between giving discovery in  
12    order to continue letting the state do its job with elections  
13    and the other.

14            And I am -- I continue to ask the Court to consider  
15    the fact that this -- that by them holding out until they get  
16    manuals and mirror images of data --

17            THE COURT: I --

18            MR. SALTER: -- to consider the fact that that puts  
19    us -- the position that that puts us in in terms of making this  
20    system more vulnerable than it is.

21            THE COURT: All right. Mr. Salter, I think we're  
22    looking at multiple different solutions. And I just -- I  
23    don't -- I really don't appreciate basically being told the  
24    world is going to basically fall apart or explode if this  
25    happens. It is not helping us.

1           If you have a regulation, tell me. We're asking for  
2     some resources. I'm going to tell Mr. Ichter not to make any  
3     threats whatsoever because it doesn't help. That obviously has  
4     impeded some of the problem -- some of the solution-making  
5     here.

6           And -- but your firm also has some very smart people  
7     working for it. And so if you are driving or you can't reach  
8     somebody, I am sure if you are needing to get one piece of  
9     information, two pieces of information that somebody else in  
10    the firm can do it to assist.

11           So I just -- I would appreciate seeing the regulation  
12    or the state law that expressly states that no -- that this is  
13    basically immune from disclosure ever and -- because there are  
14    lots of things under state law that are not supposed to be  
15    disclosed but are disclosed under a protective order. But it  
16    doesn't mean that that is what should happen here.

17           But I just -- these counties want these machines.  
18    And they seem to need them for orderly operation of -- at least  
19    some of them. And it doesn't sound like Cobb necessarily does.  
20    But Dekalb does. And I would like to address that concern.  
21    And I just don't think at this point that you-all have done --  
22    had the level of communication necessary in order to resolve  
23    this. And I think it is resolvable.

24           So we'll reserve the room at 3:30. Ms. McConochie  
25    will be in touch. And if I have to have a hearing at 5:00 --



1 it may be 5:30 for all I know. But I hope I don't have to have  
2 the hearing, frankly. Because I have to -- I have to proceed  
3 with what is already on my agenda. And you-all have a  
4 time-sensitive problem. And that is why I'm saying come down  
5 on Thursday. If it wasn't time-sensitive, I would say sure,  
6 let's wait another two weeks. But it is time-sensitive.

7 Thank you very much.

8 **(Unintelligible cross-talk.)**

9 MR. SCHNELL: One quick point. This is Grant Schnell  
10 on behalf of Merle King. And if I could just have ten seconds  
11 here.

12 THE COURT: Yes.

13 MR. SCHNELL: We haven't had any real substantive  
14 position on any of these discussions and even during this call.  
15 I'll gladly come down tomorrow at 3:30 for the meeting and  
16 hearing. But if it is agreeable -- and I'll work it out with  
17 the plaintiffs' side after this. But if we could be excused  
18 from that just so that we would not have -- I mean, I don't  
19 know that I would have anything to add.

20 THE COURT: Well, if plaintiffs' counsel agree, that  
21 is fine.

22 MR. MCGUIRE: We do, Your Honor. From the Coalition  
23 plaintiffs, we have no reason to think that Mr. Schnell should  
24 be there.

25 COURT REPORTER: Who was that speaking?

1 MR. MCGUIRE: I'm sorry. That was Robert McGuire for  
2 the Coalition plaintiffs.

3 **(Unintelligible cross-talk.)**

4 MR. SALTER: Your Honor, this is -- go ahead,  
5 Catherine. I'm sorry. Go ahead.

6 MS. CHAPPLE: No. That is okay. This is Catherine  
7 Chapple with the Curling plaintiffs. We also agree.

8 THE COURT: All right. Well --

9 MR. SCHNELL: Thank you, Judge.

10 MR. SALTER: Your Honor, this is John Salter. Do we  
11 have any insight into -- you know, we filed a notice and tried  
12 to lay out our -- where we stand on our position on immunity.  
13 Does the Court have any indication of your intent to --

14 **(Technical interference.)**

15 MR. SALTER: -- what to do with putting the case back  
16 open -- although I'm not sure it makes a difference right  
17 now -- and/or the motions to dismiss?

18 THE COURT: You know what? I will issue an order or  
19 talk to you about it tomorrow. Okay.

20 MR. MCGUIRE: Thank you, Your Honor.

21 MR. SALTER: Thank you, Judge. We would appreciate  
22 that.

23 THE COURT: Thank you. Bye-bye.

24 **(The proceedings were thereby concluded at 5:28**

25 **P.M.)**

## C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 58 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 15th day of May, 2018.

*Shannon R. Welch*

SHANNON R. WELCH, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
OFFICIAL CERTIFIED TRANSCRIPT